In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 78-1874.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,
v.
JOSEPH MEEHAN,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief for the Petitioner.

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Brief for the Petitioner.

Opinion Below.

The opinion of the Supreme Judicial Court is reported at _____ Mass. _____, Mass. Adv. Sh. (1979) 710, 387 N.E. 2d 527 (App. 62).

Jurisdiction.

The judgment of the court below was entered on March 19, 1979. The petition for writ of certiorari was filed on June 18, 1979, and was granted on October 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

I. Whether the court below applied proper constitutional standards in holding a confession to be involuntary under the Fifth Amendment in the absence of any evidence of actual coercion?

II. Whether real evidence obtained pursuant to a search warrant based on an inadmissible confession must be suppressed where the police had other legally obtained evidence to support the warrant?

III. Whether a spontaneous inculpatory statement by the defendant to his mother need be suppressed as a product of the initial illegally obtained statement?

Constitutional Provisions Involved.

Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment.

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

Prior Proceedings.

On August 11, 1976, the Suffolk County grand jury indicted Joseph Meehan for the murder of Mary Ann Birks (App. 11). Prior to trial, the defendant moved to suppress his inculpatory statements made while in custody and articles of his clothing (App. 12). After a pretrial hearing, the judge filed a memorandum of decision granting the motion in part and denying it in part, suppressing statements made to the police and a pair

of pants seized pursuant to a search warrant and allowing a statement made by the defendant to his mother (App. 59-60). The Commonwealth and the defendant then applied for leave to take interlocutory appeals pursuant to Mass. Gen. Laws, c. 278, § 28E. The applications were granted by a single justice of the Supreme Judicial Court (App. 61).

On appeal, the Supreme Judicial Court affirmed the order granting suppression but reversed the denial of the defendant's motion to suppress his statement to his mother. *Commonwealth* v. *Meehan*, _____ Mass. _____, Mass. Adv. Sh. (1979) 710, 387 N.E. 2d 527 (App. 62).

Statement of Facts.

The body of the victim was found on the front lawn of a home in the Hyde Park section of Boston in the early morning hours of June 11, 1976 (Tr. 53-54). Her face and head were covered with blood (Tr. 84-85) and a large rock found nearby was also bloodied (Tr. 600).

Police officers immediately attempted to interview people who lived in the vicinity (Tr. 55) or were known to have been at Cleary Square, a nearby gathering place, on the previous night. Mary Crowley, a neighbor, told the police in a taped interview that she had been awakened at approximately 2 A.M. on that morning. She heard a woman scream, "Don't. Please don't," and then scream wordlessly. Mrs. Crowley's daughter, Claire Wilde, who was also staying at that address, corroborated Mrs. Crowley's account and added that she, Wilde, had looked out the window and had seen a white male walk by the house. Although she did not see his face, she described him as about five feet ten inches, dark-haired, slender, in his mid-twenties, and wearing faded jeans, with his shirt sleeves rolled up. The man returned a few minutes later and

Mrs. Wilde heard the sound of a large boulder being thrown on the lawn (*Memorandum of Decision*, App. 63).

Later in the morning the police interviewed, at the Hyde Park police station, four persons who had been in Cleary Square the previous evening. One of them, Joseph Ventola, who was acquainted with the victim, said that he had seen her around midnight on the steps of Christ Church at 1220 River Street. With her was a man whom Ventola described as being in his late teens, skinny, dark-haired and shirtless (*Memorandum of Decision*, App. 64). A second witness, John Carroll, said that he had seen the victim on the church steps and that she was with Joseph Meehan, whom he knew (Tr. 195, 206, 218).

During the course of Carroll's interview, he looked out the window of the first floor room in the police station and saw the defendant on Hyde Park Avenue (Tr. 205). He pointed him out to the police officers. Detective Solari passed through the open first floor window to the street and Officers Cannon and Russo went out the front door (Tr. 116, 120). Russo proceeded up the street on foot and Solari and Cannon came in a cruiser (Tr. 121). Officer Cannon told Meehan that they were investigating an assault and that they had been told that he was in the vicinity on the previous evening. They asked the defendant if he would accompany them to the station for an interview (Tr. 125). The defendant said he was willing to go, but expressed concern that he would be late for an appointment to file an appeal concerning unemployment benefits. The officers said that they would drive him, should he be delayed (Tr. 126-127). The defendant thereupon opened the cruiser door and sat down in the back (Tr. 141). The defendant was 18 years old, five feet six inches, and was wearing a print shirt with the sleeves rolled up and cut-off dungarees (Tr. 142). This encounter occurred at approximately 10:30 A.M. (Tr. 125).

The defendant was taken to the station where he was interviewed by Detective Solari. Solari noticed red stains on the defendant's sneakers (Tr. 143). When Solari asked him about them, the defendant explained that it was probably mud (Tr. 143). Solari suggested that it looked like blood (Tr. 144). The defendant then said that the stains were from a fight he had been in several days earlier with a George Quish (Tr. 129, 144). Solari asked to see the sneakers and the defendant gave Solari his left sneaker. Solari took the sneaker, left the room, and showed it to Sergeant Feeney, who agreed that the stains were bloodstains (Tr. 145). Quish, who was also being interviewed in the station at the same time, denied he had been in a fight with Joseph Meehan (Tr. 145, 607, 648). Feeney then told Solari to arrest the defendant and give him his *Miranda* warnings, which he did (Tr. 145-146).

Later that morning, at about 11:20 A.M., Sergeant Kelley commenced the interrogation of the defendant with Officers Feeney, Russo, and Madden present. Kelley told the defendant that the victim was dead and that he was under arrest. Kelley again gave the defendant his *Miranda* warnings, and the defendant acknowledged each part of the warnings (Tr. 90) by saying "yes" or "right" (Ex. 14, App. 22-42). The defendant admitted that he knew the victim and had spoken with her on the preceding Tuesday (Ex. 14, App. 24).

Kelley then informed the defendant that two witnesses had seen him on the steps of the church the previous evening and that both witnesses knew the defendant (Ex. 14, App. 27). Kelley referred to the witnesses several times in the course of his interrogation and told the defendant that they had a good case. The defendant admitted that he and the victim had been together on the church stairs the night before, but said they parted soon afterward (Ex. 14, App. 31). The defendant also said that he was high and had taken 15 Valium pills and had drunk a "few six-packs" of beer (Ex. 14, App. 33, 36).

The defendant then asked what effect on the case his confessing would have. Kelley told the defendant that if he confessed, he could make no promises, and could only let the court know that the defendant had cooperated. Kelley indicated that when a defendant told the truth, "the court looks upon [such] cases . . . a lot better than when we have to prove it the hard way" (Ex. 14, App. 34-35). He also added that he thought the truth would make a good defense in the defendant's case. Kelley then discussed extenuating factors with the defendant, i.e., his intoxication, and also asked if the victim had provoked him (Ex. 14, App. 36). Continuing his questioning, Kelley asked about the circumstances of the previous evening. The defendant answered questions which indicated that he and the victim had gone to 40 Oak Street together, that the victim had refused to have sexual intercourse with him, that he became enraged and kicked her in the face and head several times, knocking her unconscious, that he left, found a large rock and returned and threw it on the unconscious victim. After the confession, the defendant asked if he had been "railroaded" into a conviction and Kelley assured him no (Ex. 14, App. 22-42).

That afternoon, based on the confession and the statements of the witnesses, Claire Wilde and John Carroll, Officer Solari applied for a warrant to search the defendant's house for the dungarees he had been wearing. The dungarees and a pair of undershorts were recovered in the search (Tr. 618, 669; Exs. 4, 5, App. 17-21).

At approximately 3:30 P.M. that afternoon, after being informed of the defendant's situation, the defendant's mother and brother arrived at the police station (Tr. 614). They were told that the defendant had already confessed and were escorted to the defendant's cell. Officer Feeney testified that when the defendant saw them he began to cry and said, "Ma, I didn't mean to hit her so hard" (Tr. 615). The defendant

and his mother said that the defendant merely said, "I'm sorry, Ma" (Tr. 487). The mother and brother then advised the defendant to say nothing to the police (Tr. 487).

The police officers testified that at all times, from when the defendant was first spoken to on the street, he appeared steady on his feet, his eyes were clear, his speech was not slurred, and he responded to conversation and questions coherently (Tr. 150-151, 608-609, 660).

At the pretrial hearings, the defendant filed a motion to suppress his confession. Attached to the motion was the defendant's affidavit alleging that on June 10, 1976, at approximately 9 P.M., he ingested approximately twenty Valium tablets; that on June 11, 1976, at approximately 8:30 A.M., he ingested three or four additional Valium tablets; and that on June 10, 1976, between 6 P.M. and 11 P.M. he drank approximately twelve beers. He further alleged that he did not remember all the questions asked or the answers given during his interrogation (App. 13).

The defendant testified that during Thursday, June 10, 1976, he intermittently consumed various quantities of beer and marijuana (Tr. 563). He also testified that he purchased twenty Valium tablets, and swallowed a handful (Tr. 562-563). He further testified that the next morning he swallowed the rest of the Valium, about four tablets; that he had used heroin since the age of fourteen and had also used Valium in excessive quantities when heroin was not available (Tr. 561), and that he drank beer and smoked marijuana (Tr. 562). The defendant alleged that he did not remember kicking Miss Birks in the head five to ten times or telling the police that he had done so (Tr. 567).

Dr. Greenblatt, the defense's expert witness, testified that the observable effects of an excessive dose of Valium are to induce difficulty in walking, slurring of speech, and possible impairment of memory and judgment (Tr. 298). Dr. Greenblatt

also testified that by 11:30 A.M., twelve, thirteen, or fourteen hours after ingestion, the effects of Valium cannot be stated with certainty because they wear off (Tr. 310). He further testified that it is impossible to predict for any individual how profound the effects of Valium will be, and impossible to predict how much residual effect there would be from drugs ingested on a previous night (Tr. 313, 328, 332). On cross-examination, Dr. Greenblatt testified that tolerance of the drug develops after chronic and habitual use. He further testified that the effect of tolerance is to reduce the intensity and the duration of the effects of the drug upon the user (Tr. 320-321).

The Commonwealth's expert witness, Dr. Robert Sovner, agreed with Dr. Greenblatt both as to the effects of Valium and as to the development of tolerance to the effects after prolonged habitual use (Tr. 687-688). He added that Valium is primarily used in psychiatry to alleviate symptoms of anxiety (Tr. 689). He also testified that the peak effects of the largest doses of Valium are reached within two hours after ingestion (Tr. 689). After listening to the tape of the defendant's confession, Dr. Sovner concluded that the defendant was, at the time of his statement, alert, oriented and self-possessed (Tr. 696-697).

The defendant's mother testified that he (the defendant) had graduated from the ninth grade and had attended two years of high school before he was expelled (Tr. 476).

Summary of Argument.

I. This case presents the question whether the Supreme Judicial Court applied correct constitutional standards in holding that certain statements and real evidence must be sup-

pressed at trial because an initial confession was involuntarily obtained. The Commonwealth maintains that the court applied an incorrect standard in that it based its finding on a factual premise which, it will be argued, this Court has rejected, i.e., that custodial interrogation itself supplies sufficient evidence of actual coercion to require a finding of involuntariness where none of the other factors considered by the court are in themselves coercive. The rejection of this factual premise underlying the Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), is apparent in this Court's persistent examination of historical Fifth Amendment considerations after determining that the requirements of *Miranda* have been technically violated; if custodial interrogation itself were considered inherently coercive, there would be no need to test the level of compulsion once *Miranda* had been violated in any way. Thus, given that a mere *Miranda* violation is not a per se violation of the Fifth Amendment, a confession is inadmissible only if found to be coercive according to traditional standards of voluntariness.

According to that test, however, the finding of the Supreme Judicial Court of Massachusetts cannot be upheld. In holding that the confession was involuntary, the court utilized a set of factors which are not coercive. When viewed as possibly establishing a setting in which actual coercion might have been exerted, little is gained. Indeed, the conduct of the accused both before and after his arrest is inconsistent with a finding that his will was overborne by police practices. Additionally, the misrepresentation as to the number of identifying witnesses and the admonition that it is better to tell the truth are not coercive and do not render a statement involuntary. To support a finding of involuntariness, what is constitutionally required is that there be a finding of some actual act of coercion. In adding together a set of factors, in themselves not coercive, and holding the confession involuntary, the lower court impermissibly extended the clear requirements of the traditional constitutional standard. The correct constitutional standard, the Commonwealth submits, is that in order for a confession to be held admissible, it must comport with fundamental fairness as required by the Fourteenth Amendment.

However, under a Fourteenth Amendment test — a consideration of the totality of the circumstances under which the confession was obtained — the confession was clearly voluntary. None of the factors which normally provide a foundation for a finding of involuntariness — e.g., torture, prolonged interrogation, injection of truth serum, etc. — was present. Additionally, there existed many positive factors which indicated that the defendant's will was not overborne in any way.

Finally, the prophylactic standards of *Miranda* were complied with completely. This Court has never required more than a "yes" or "no" answer to the questions asked in compliance with *Miranda*; nor has it held that the accused is entitled to an elaborate explanation of the meaning of those rights. That the interrogation following waiver was skillful has no bearing — logical or otherwise — on the quality of the waiver itself. Finally, the ingestion of beer and drugs the night before the interrogation does not preclude a finding of valid waiver of the procedural requirements of *Miranda*. The accused's behavior was not aberrational in any sense and, to the extent that his judgment was impaired, this impairment did not reach a level which precluded the possibility of a knowing, intelligent and voluntary waiver of those procedural requirements.

II. Even if it is deemed that the statement was obtained in violation either of the Fifth Amendment or of the waiver requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), it may be utilized in a collateral proceeding, i.e., as a partial basis for demonstrating probable cause for the issuance of a search war-

rant, and the real evidence seized pursuant to that warrant is admissible at trial.

The Fifth Amendment by its own terms bars only use of compelled testimonial evidence at trial, and it does not bar compulsion of real evidence. This Court has repeatedly rejected a per se application of the exclusionary rule to all proceedings and for all purposes. Therefore, a balancing test is appropriate and, given no flagrant misbehavior on the part of the police, the deterrent purpose of the exclusionary rule would not be effectuated by exclusion of real probative evidence.

Miranda v. *Arizona* was limited to the question of admissibility of statements in the prosecution's case in chief. *Miranda*, at 445. Given that a violation of *Miranda* does not necessarily involve a violation of a constitutional right, the "fruit of the poisonous tree" doctrine is not applicable, for that doctrine is triggered only by an initial constitutional violation. The Supreme Judicial Court has therefore erred in requiring automatic per se exclusion for all purposes.

III. A spontaneous statement made to a family member approximately three hours after the interrogation, that is neither elicited by police nor addressed to them, is not subject to exclusion under the "cat-out-of-the-bag" theory. Such a rule would automatically preclude all voluntary statements made after an illegal interrogation and is not constitutionally required.

Argument.

I. The Decision of the Supreme Judicial Court Falls Within a Recognized Exception to the Finality Requirement of 28 U.S.C. § 1257(3).

Under Massachusetts procedure,[1] an application for interlocutory appeal from an order of the Superior Court determining a motion to suppress may be taken by either the Commonwealth or a defendant. In the instant case, both parties sought relief from the order of the Superior Court. The application was granted and the appeal reported to the full court (Supreme Judicial Court) for hearing (App. 61). The court ordered that a confession, a subsequent admission and certain physical evidence seized pursuant to a warrant be suppressed at trial because they were obtained in violation of the Fifth Amendment. This decision of the highest court of the Commonwealth falls directly into the third category of exceptions to the finality requirement established in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

> "In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." 420 U.S. at 481.

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[1] Mass. Gen. Laws, c. 278, § 28E (see, *Petition for Writ of Certiorari*, Appendix A, 1a).

The decision of the court is final and conclusive of the federal issue regardless of the outcome of further proceedings. If the defendant is acquitted, the Commonwealth under both state and federal law is prohibited from appeal. Thus, the instant case presents a stronger example of an exception to the finality rule than *California* v. *Stewart*, 384 U.S. 436 (1966), which heretofore has been held to epitomize this category of cases. In taking jurisdiction in *Stewart*, this Court stated:

> "After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. § 1257(3) (1964 ed.), we denied the motion. 383 U.S. 903." 384 U.S. at 498 n.71.

At the time of the *Stewart* decision only state law prohibited the prosecution from appeal.[2] However, under *Benton* v. *Maryland*, 395 U.S. 784 (1969), federal double jeopardy standards are now applicable to the states and therefore under federal law the prosecution is not permitted to present its federal claim for review.

The force of this argument has been noted.

> "In this situation the state is not responsible for its inability to appeal after final judgment, nor are there any means available to the Court by which it can circumvent

[2] *Palko* v. *Connecticut*, 302 U.S. 319 (1937), was controlling.

> the barrier to review after final judgment. An exception to finality could not by definition conflict with the adequate state grounds doctrine. Nor would recognition of such an exception undermine the systematic benefit of the entire case model; the category would be restricted to a small class of cases and its applicability would be clear and predictable." Note, *The Finality Rule for Supreme Court Review of State Orders*, 91 Harv. L. Rev. 1004, 1023 (1978).

The decision of the Supreme Judicial Court carries with it a greater degree of finality than the decision of the California court in *Stewart*. The evidence that the Commonwealth sought to introduce has been finally and absolutely excluded as being obtained in violation of federal principles; however, in *Stewart*, the California Supreme Court had "left the State free to show proof of a waiver." 384 U.S. at 525 (Harlan, J., dissenting). Further litigation of the federal issue in the instant case, however, is precluded.

Finally, the Commonwealth suggests that a pretrial order suppressing evidence which has been reviewed and conclusively determined by the highest court of the state also falls within the so-called "collateral order" exception established in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).[3] In *Cohen*, the Court classified certain judgments as falling into

> "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate con-

[3] The reasoning of *Cohen* has been applied to criminal cases. *Stack* v. *Boyle*, 342 U.S. 1 (1951).

sideration be deferred until the whole case is adjudicated." *Id.* at 546. See also *National Socialist Party* v. *Skokie*, 432 U.S. 43 (1977).

In the instant case, the ultimate issue to be determined in the further state court proceeding is the guilt or innocence of the accused. The federal issue presented for review herein is independent of that ultimate issue.

Where a state has provided a procedure for review of a federal issue and a final decision has been rendered on that issue by the highest court of the state, and the party seeking review of that issue in this Court is forever barred by federal and state law from again raising the claim regardless of the outcome of further state proceedings, this Court has jurisdiction to resolve the claim presented under 28 U.S.C. § 1257(3). *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 481.

II. The Supreme Judicial Court has Applied an Incorrect Standard in Holding the Confession to be Inadmissible.

The Supreme Judicial Court affirmed the trial judge's finding that the defendant's confession was involuntary or, as the court stated the issue, "the Commonwealth had not carried the heavy burden of establishing that it was voluntary, see *Commonwealth* v. *Murray*, 359 Mass. 541, 546 (1971); *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966)." *Commonwealth* v. *Meehan*, _____ Mass. _____, Mass. Adv. Sh. (1979) 710, 721, 387 N.E. 2d 527, 533 (App. 72). The referenced portion of *Miranda* v. *Arizona* provides:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U.S. at 475.

The court concluded that the defendant's confession was involuntary and "thus directly offensive to the Fifth Amendment." *Meehan*, 387 N.E. 2d at 536 (App. 77). There is a certain ambiguity in the opinion of the court. On the one hand, the court held that the prosecution did not satisfy its heavy burden of proving a knowing, intelligent and voluntary waiver, 387 N.E. 2d at 533 (App. 72), and, on the other hand, the court held that the confession itself was involuntary, 387 N.E. 2d at 536 (App. 77). Since it is unclear whether the court based its conclusion on a view of the Fifth Amendment's privilege against compelled testimony as applicable to police interrogations or on an apparent equation of a violation of the waiver requirement of *Miranda* with a violation of the Fifth Amendment, both propositions will be addressed.

The Commonwealth will submit that not only is the confession not involuntary under correctly applied constitutional standards, but that there exists no violation of any requirement of *Miranda* v. *Arizona* and, further, that the court below has incorrectly treated *Miranda* requirements as co-extensive with the Fifth Amendment. Finally, the Commonwealth will suggest that the question of the voluntariness of confessions, obtained through police interrogation and their subsequent admissibility, is more properly determined by the Due Process Clause and its inherent requirement of fundamental fairness than by the privilege contained in the Fifth Amendment.

A. *The Fifth Amendment Privilege is Violated Only by Actual Official Coercion.*

It is the Commonwealth's position that in order automatically to bar the use of testimony on the basis that it was obtained in violation of the Fifth Amendment privilege, an official act constituting actual or genuine compulsion must be demonstrated. This requirement was recognized by the Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), wherein the application of the Fifth Amendment privilege was extended to extrajudicial interrogation. In making this extension, the Court posited the necessary factual premise that custodial police interrogation was "inherently coercive."

> "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak." *Miranda* v. *Arizona*, 384 U.S. at 461.

Such a premise was necessary to support the Court's conclusion that unless the safeguards which the Court then promulgated were complied with and the prosecution established a waiver, any statement must be excluded.

> "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 U.S. at 458.[4]

The presumption of inherent compulsion was necessary because clearly the words of the Fifth Amendment forbid the

[4] See also *id.* at 457, 467.

"compelling," not the "taking," of statements. Thus the question of waiver would not arise without the initial factual premise that custodial interrogation in itself is coercive.[5] See generally Friendly, *Benchmarks*, 269-272 (1967).

Recent decisions of this Court have necessarily implied a rejection of this factual premise for the majority's holding in *Miranda*, i.e., that police interrogation is so inherently coercive that, without the enumerated warnings and waiver requirements, an individual's decision to speak could not be deemed to be free or voluntary.

In *Michigan* v. *Tucker*, 417 U.S. 433 (1974), this Court noted that the Court in *Miranda* acknowledged that it had gone beyond traditional voluntariness concepts.[6]

> "The Court recognized . . . [in *Miranda*] that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. As the Court remarked:
>
> > "'[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.' *Id.* at 467.
>
> "The suggested safeguards were not intended to 'create a constitutional straightjacket,' *ibid.*, but rather to provide practical reinforcement for the right against compulsory self-incrimination." *Michigan* v. *Tucker*, at 444.

[5] It is apparently the assumption of the Supreme Judicial Court that this premise has continued validity for, as will be discussed *infra*, it points to no specific act of official coercion in reaching its decision that the confession was involuntary.

[6] *Miranda*, at 457.

Rather than employ the premise of *Miranda* and view police interrogation as inherently coercive, the *Tucker* Court's analysis focused solely upon historical Fifth Amendment considerations.

> "A comparison of the facts in this case with the historical circumstances underlying the privilege against compulsory self-incrimination strongly indicates that the police conduct here did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*. Certainly no one could contend that the interrogation faced by respondent bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed.
>
> . . . . . .
>
> ". . . [H]is statements could hardly be termed involuntary as that term has been defined in the decisions of this Court.
>
> . . . . . .
>
> "Our determination that the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination does not mean there was not a disregard, albeit an inadvertent disregard, of the procedural rules later established in *Miranda*." *Michigan* v. *Tucker*, at 444-445.[7]

[7] The Commonwealth recognizes that *Tucker* involved a pre-*Miranda* violation, but suggests that that fact does not militate against the view that the Court rejected the initial premise of *Miranda*.

If the Court were of the continued view that custodial police interrogation itself supplied the compulsion necessary to invoke the Fifth Amendment, the question of the sufficiency of the compulsion would not arise.

Unless this Court was rejecting the "inherently coercive" premise, to limit inquiry to historical considerations underlying the Fifth Amendment would be inconsistent with *Miranda*, which by its own terms went beyond the traditional concept of voluntariness. As the Court stated:

> "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms." *Miranda*, at 457.

Oregon v. *Mathiason*, 429 U.S. 492 (1977), continued the implicit rejection of the "inherently coercive" premise. In *Mathiason*, this Court held that a parolee who came to the police station voluntarily, yet at the request of his parole officer, who was told that he was not under arrest, yet was told falsely that his fingerprints had been found at the scene of a burglary, and who then confessed, before being given the *Miranda* warnings, was not in custody for *Miranda* purposes. This Court rejected the view that mere questioning at the station house constitutes a "coercive environment." *Mathiason*, at 495. This result, the Commonwealth respectfully submits, differs substantially from the broad and darkly sinister picture of station house interrogation painted by the majority in *Miranda*.[8] Even without the formal announcement of arrest, Mathiason was subject to the same type of experience the *Miranda* decision sought to protect him against, i.e., the "incommunicado interrogation of individuals in a police-dominated

[8] *Miranda*, at 445-458.

atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." *Miranda*, at 445.

The Commonwealth submits, therefore, that the premise that all police interrogation is inherently coercive has been rejected and that, without such a premise, the Fifth Amendment's direct command against the *use* of compelled testimony does not operate to require automatic exclusion of statements obtained through police interrogation absent a showing of actual coercion independent of the fact of custodial interrogation itself. Indeed, it is questionable whether, with the rejection of *Miranda's* factual premise, there is any justification for extending the constitutional privilege to an extrajudicial setting at all.

Further indication that the Court has rejected any equation of *Miranda* and the Fifth Amendment is found in recent decisions holding that statements taken in violation of *Miranda* are not per se inadmissible at trial for all purposes. In *Harris* v. *New York*, 401 U.S. 222 (1971), the statements of a defendant who had not been advised of his right to counsel were held admissible for impeachment purposes.

In *Oregon* v. *Hass*, 420 U.S. 714 (1975), the Court, holding that statements taken after a defendant had expressed a desire to speak with an attorney were admissible on rebuttal for impeachment purposes, stated:

> ". . . it does not follow from *Miranda* that evidence inadmissible against Hass in the prosecution's case in chief is barred for all purposes, always provided that 'the trustworthiness of the evidence satisfies legal standards.' [*Harris* v. *New York*,] 401 U.S., at 224." 420 U.S. at 722.

The implication of the these cases is that, contrary to *Miranda*, a confession or statement is not considered to be coerced in the Fifth Amendment sense merely because of failure to give

the warnings or to observe them effectively. Rather, inquiry must be made as to voluntariness in the traditional sense. The Commonwealth submits that, had the Court not abandoned the *Miranda* premise of "inherent coercion," the Court would not have considered the "trustworthiness" of the statements. To do so without an implicit rejection of the "inherent coercion" premise would be inconsistent with the well established principle that statements which are compelled in violation of the Fifth Amendment are per se inadmissible because they are in fact involuntary.

> "The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles." *Lego* v. *Twomey*, 404 U.S. 477, 485 (1972).

Inquiry as to trustworthiness or reliability is irrevelant to Fifth Amendment violations. *Rogers* v. *Richmond*, 365 U.S. 534, 540-541 (1961). If the statement is coerced, it is involuntary and therefore inadmissible for that reason alone. Hence, had this Court considered *Miranda* to be of parallel constitutional status with the Fifth Amendment, it would be inconsistent, at best, to hold that statements taken in violation of *Miranda* requirements could be found t be "otherwise trustworthy" and thereby admissible in a judicial proceeding.

For the above stated reasons, the Commonwealth suggests that this Court has rejected the factual assumption of the *Miranda* majority[9] and now requires something more than the fact of custodial interrogation to demonstrate actual coercion. If the mere fact of custodial interrogation does not in itself fur-

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[9]See generally, *The Supreme Court, 1973 Term*, 88 Harv. L. Rev. 41, 199-202 (1974); Ritchie, L.J., *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition*, 61 Minn. L. Rev. 383, 418 (1977).

nish evidence of genuine compulsion, the formula employed by the Supreme Judicial Court to determine that the statement was involuntary will not suffice.

B. *A Simple Compilation of Noncoercive Factors does Not Support a Conclusion that a Statement is Involuntary.*

The Supreme Judicial Court based its conclusion that defendant's statement was involuntary on the following factors[10]:

> "The defendant, eighteen years of age, with a poor educational background, uninformed of his right to reach his family or friends, his judgment impaired through intoxication, confessed after being told that the case against him was established and after receiving assurance that the confession would assist his defense." 387 N.E. 2d at 536 (App. 77).

However, none of these factors is in itself coercive, and their relevance to the issue of voluntariness has been specifically limited. They are "relevant *only* in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect. See *Darwin* v. *Connecticut*, 391 U.S. 346; *Greenwald* v. *Wisconsin*, 390 U.S. 519; *Davis* v. *North Carolina*, *supra*." *Procunier* v. *Atchley*, 400 U.S. 446, 453-454 (1971) (emphasis supplied).

On analysis, these factors add little to establishing a setting for actual coercion. The defendant was not a juvenile. He

[10] It is not only open to this Court, as a matter of federal constitutional law, to apply constitutional principles to the facts as found by the state court (*Brewer* v. *Williams*, 430 U.S. 387, 404 [1977]), but the Court has an affirmative duty to do so. *Haynes* v. *Washington*, 373 U.S. 503 (1963).

had graduated from the ninth grade and had attended two years of high school (Tr. 476). While he was not specifically informed of his right to use a telephone as prescribed by Mass. Gen. Laws, c. 276, § 33A,[11] he was twice given his full warnings as prescribed by *Miranda* and acknowledged each warning (Ex. 14, App. 23).

The court below found that the defendant's judgment was impaired. However, that impairment was the result of the defendant's own voluntary ingestion of alcohol and drugs the previous night. While such a finding is a relevant consideration, it does not automatically invalidate a waiver (*Commonwealth* v. *Hooks* ____ Mass. ____, Mass. Adv. Sh. (1978) 1356, 376 N.E. 2d 857), let alone automatically render a statement involuntary. Indeed, based upon the testimony of both doctors, such impairment could only be deemed minimal[12] and consistent with a hangover.

That the defendant was not so intoxicated as to be rendered, by that reason alone, incapable of voluntarily making a statement is supported by the trial court's own finding that the defendant *voluntarily* accompanied the police to the station house (App. 49), and that he *voluntarily* gave up his sneaker (App. 50). That the defendant was capable of formulating a course of action was demonstrated by the fact that he had determined to go to the unemployment office to appeal the denial of his benefits (Tr. 126-127). Such conduct is not consistent with the picture of a man so overcome by intoxication as to preclude rational decision.

[11] The courts of Massachusetts have never held that violation of this statute requires exclusion of a defendant's statement obtained while in custody. Violation of such a state statute is not, in any event, determinative of voluntariness. See, e.g., *Gallegos* v. *Nebraska*, 342 U.S. 55, 63 (1951); *Lisenba* v. *California*, 314 U.S. 219, 235 (1941).

[12] There was also testimony that the defendant had been observed taking Valium for "a couple of years" (Tr. 272-273).

The remaining factors relied upon by the court are similarly not coercive. Misrepresentation as to the number of identifying witnesses does not constitute coercive police behavior.[13] *Frazier* v. *Cupp*, 394 U.S. 731 (1969). *Michigan* v. *Mosley*, 423 U.S 96 (1975). Nor does the admonition that it is better to tell the truth constitute a police practice which has been denoted coercive, thereby necessarily rendering a statement involuntary. *United States* v. *Barfield*, 507 F. 2d 53 (5th Cir. 1975), *cert. denied*, 421 U.S. 950 (1975). *United States* v. *Glasgow*, 451 F. 2d 557 (9th Cir. 1971). *United States* v. *Ferrara*, 377 F. 2d 16 (2d Cir. 1967), *cert. denied*, 389 U.S. 908 (1967).

It is important to note that the police in this case made no promises. The officer specifically told the defendant that he could make no promises on three occasions (Ex. 14, App. 35, 36).[14] Moreover, an assurance that a suspect's cooperation would be made known to the authorities and that it might bring the defendant some consideration is not a sufficient inducement to render a statement involuntary. *United States* v. *Frazier*, 434 F. 2d 994 (5th Cir. 1970).

Application of *Bram* v. *United States*, 168 U.S. 532 (1897), does not compel a finding of involuntariness in the instant case.[15] In *Bram*, the Court quoted with approval language

[13] The alleged misrepresentation is minimal. John Carroll specifically identified Meehan by name. It is entirely reasonable that the other witness who observed the victim with a young man would have identified Meehan as that man.

[14] This case therefore is distinguishable from *Grades* v. *Boles*, 398 F. 2d 409 (4th Cir. 1968), wherein a defendant who had not been advised of his right to counsel steadfastly refused to admit anything to police officers during several hours of interrogation, but who, when brought to the prosecuting attorney who promised that he would be tried on only one charge and not be charged as a habitual offender, immediately signed a confession. No such promise was made in the instant case.

[15] The application of the Fifth Amendment privilege to the law of confessions in *Bram* has been severely criticized. 8 Wigmore, *Evidence*, § 2266 (1961).

from 3 *Russell on Crimes* 478 (6th ed.), which indicated that a confession to be admissible "must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . .." 168 U.S. at 542-543. However, literal per se application of this stricture is not, it is suggested, required. As the Court itself noted, the question of voluntariness is primarily one of fact and every case, therefore, must turn on its own facts. 168 U.S. at 549.[16]

It is conceded that certain statements of Officer Kelley could be characterized as offering an inducement, but they do not, it is suggested, constitute psychological coercion. The officer stated:

> "If you wish to tell the truth of what happened, then I can say in all fairness it would probably help your defense; in fact, I am sure it would. So I hope that explains it that I cannot promise you anything now." (Ex. 14, App. 35.)

And, in response to the defendant's question, ". . . if I tell you right, it is going to come out in the court," the officer responded:

> "Q. Joe it is going to come out in court eventually. It is going to come out through witnesses, through evidence, stuff like that? As I said before, we are not holding you here on a little thread of evidence. We have a good case here. I am no attorney. I am only a policeman, but we certainly have a case. As I said before, if there is anything

[16] It should also be noted that the defendant in *Bram* was interrogated while stripped naked.

more you want to add to it, and my suggestion is the truth is going to be a good defense in this particular case. So it is up to you Joe? A. I don't know." (Ex. 14, App. 36.)

It should be noted that the first statement was made in the context of making the defendant's cooperation known to the authorities and to his attorney. The second reference does suggest that confession would be better, but to hold that such a suggestion is constitutionally impermissible ignores the realities of police interrogation. *United States* v. *Williams*, 479 F. 2d 1138 (4th Cir. 1973), *cert. denied*, 414 U.S. 1025 (1973). Obviously, the only rational reason for a person to confess is if he thought it was in his best interest. It is unrealistic to insist that police ignore this factor; to do so, it is suggested, renders interrogation virtually meaningless.

Distinction must be made between police threats or promises which present a grisly alternative (*Brown* v. *Mississippi*, 297 U.S. 278 [1936]) or are of a nature likely to produce a false confession in hope of reward or relief, and a simple suggestion of what gain there might be to the defendant in telling the truth, a suggestion which, it is submitted, when read in context of the entire interrogation, was not made repeatedly during a period of prolonged isolation (cf. *Malinski* v. *New York*, 324 U.S. 401 [1945]). It simply cannot be said to be a suggestion designed and sufficient to produce a false confession or a technique likely to overbear the will of the accused. Compare *Spano* v. *New York*, 360 U.S. 315 (1959).

It is suggested that "voluntariness" does not require a total absence of intimidation or inducement. The test is not whether the statement would have been made without the suggestion that it was better to tell the truth. Rather, it is suggested, the test is twofold and requires a demonstration that the trick or inducement is sufficient to produce a false confes-

sion and, on the whole, that the interrogation does not comport with fundamental standards of justice in a civilized society. See generally, *Jurek* v. *Estelle*, 593 F. 2d 672 (5th Cir. 1979); White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581 (1979).

> "[I]f 'voluntariness' incorporates notions of 'but-for' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 224 (1973) (citations omitted). See also *Hutto* v. *Ross*, 429 U.S. 28 (1976).

It is suggested that the factors considered by the Supreme Judicial Court are not in themselves coercive and that, simply by adding such factors together, one does not reach a finding of involuntariness. Rather, these factors are relevant only in establishing a setting in which actual coercion might have been exerted to such a degree as "to overcome the will of the suspect." *Procunier*, *supra*, 400 U.S. at 453-454. This constitutional standard requires that actual official coercive conduct (physical or psychological) occur before a finding of involuntariness can be made, and it further recognizes that total freedom from all pressures is not required, but only that no official action can be deemed to have overcome the will of the suspect.

Therefore, the petitioner suggests that the court below incorrectly applied the test for determining voluntariness and impermissibly extended the constitutional stricture against compelled testimony to include situations in which no compulsion, as that term is understood in a constitutional sense, existed.

However, the Commonwealth recognizes that a confession, to be admissible, must be obtained in a manner comporting with fundamental fairness as required by the Fourteenth Amendment. The Commonwealth submits that this is the appropriate test, for it permits a realistic balancing of the degree of compulsion actually exerted against the subjective state of an average defendant; the Commonwealth submits that it has sustained its burden under this test.

C. *The Circumstances Surrounding the Instant Case do Not Support a Conclusion that the Defendant's Will had been Overborne so as to Render his Statement Violative of Federal Constitutional Standards.*

While the Commonwealth does not suggest that the Court may determine voluntariness simply by a mere "color-matching of cases," *Reck* v. *Pate*, 367 U.S. 433, 442 (1961), it does suggest that comparison of the circumstances found in the instant case and those factors which have led to a finding of involuntariness will present some relevant guidelines for decision.

There is not present in this case any gross abuse which has in other cases compelled a finding of involuntariness, such as beatings, see *Brown* v. *Mississippi*, 297 U.S. 278 (1936), or "truth serum[s]," see *Townsend* v. *Sain*, 372 U.S. 293 (1963); nor is the defendant either mentally defective or insane, cf. *Culombe* v. *Connecticut*, 367 U.S. 568 (1961) (defendant mentally defective); *Fikes* v. *Alabama*, 352 U.S. 191 (1957) (defendant a highly suggestible schizophrenic); nor does this case involve any prolonged interrogation, cf. *Blackburn* v. *Alabama*, 361 U.S. 199 (1960) (defendant insane and incompetent, confessed after 8-9 hours of incommunicado interrogation); *Davis* v. *North Carolina*, 384 U.S. 737 (1966) (defendant in custody for 16 days, interrogated daily). Moreover, there was, it is submitted, no deception of a magnitude which would compel a finding of involuntariness, cf. *Spano* v. *New York*, 360 U.S. 315 (1959) (childhood friend, a policeman, during four interrogations made misrepresentations to gain defendant's sympathy and confession); *Leyra* v. *Denno*, 347 U.S. 556 (1954) (confession induced by psychiatric manipulation); and there were no direct threats or promises, see *Lynum* v. *Illinois*, 372 U.S. 528 (1963) (promises of recommended leniency and threat of loss of children).

It is not only the absence of gross factors indicating involuntariness but the presence of positive factors which indicate that the defendant's "will to resist" was not overborne. *Rogers* v. *Richmond*, 365 U.S. 534, 544 (1961). The defendant was at the outset of the interrogation advised of his rights as required by *Miranda*.[17] He acknowledged each warning (Ex. 14, App. 23). He was then asked: "Are you willing to talk to me about Maryann Birks?" He answered, "Yes." The interrogation then began. No serious argument can be made that this exchange is not a sufficient waiver under *Miranda*. *North Carolina* v. *Butler*, ____ U.S. ____, 99 S. Ct. 1755 (1979).

The defendant had no difficulty in answering general questions about his age, address, description of his home and telephone number. Nor can it be said that he was unaware of the precarious nature of his predicament. He first denied he knew the victim, then admitted talking to her (Ex. 14, App. 23-24), then said he last saw her the previous Tuesday (Ex. 14, App. 24). He attempted to explain away the blood on his sneakers (Ex. 14, App. 25),[18] and he attempted to mitigate his

[17] On this fact, there can be no quarrel, as a contemporaneous tape recording was made (Ex. 14). A full transcription of this recording appears in the Single Appendix at pp. 22-42.

[18] He was sufficiently alert to attempt to correct the officer that blood appeared on only one sneaker (Ex. 14, App. 25).

actions, claiming he was "whacked out" (Ex. 14, App. 41), that he was high on Valium and that the victim was "making fun of [him] . . . and [he] flipped out" (Ex. 14, App. 36).

Moreover, the defendant's own affidavit in support of the motion to suppress (App. 13) does not allege compulsion or involuntariness. He stated:

> "9. At the time I was questioned I was unaware of the need for a lawyer or of my right to a lawyer and I was frightened."

Such assertions weaken any argument that the statement was involuntary. *United States* v. *Diop*, 546 F. 2d 484 (2d Cir. 1976). There can be no doubt that the defendant was advised of his right to counsel (Ex. 14, App. 23), and that he was apprised of the seriousness of his situation (Ex. 14, App. 23). That he was frightened indicates that he was quite aware of his situation — a situation in which, it is suggested, any normal person would be fearful. In any case, that a suspect is fearful or apprehensive does not render a confession involuntary. *Grooms* v. *United States*, 429 F. 2d 839 (8th Cir. 1977).

The criticisms leveled by the state court — that the interrogation was skillful (App. 57), that the police asked leading questions (App. 56) — seem to view an ordinary police investigation of an unsolved crime as an analogue of a criminal trial and, at least inferentially, suggest that the same constitutional requirements apply. The Commonwealth suggests that the Constitution does not so require, and further suggests that such a view is an unfortunate consequence of basing limitations on extrajudicial interrogation on the Fifth Amendment, rather than on the Due Process Clause.

In summary, the defendant was not held incommunicado and was not subjected to protracted interrogation — his initial

contact with the police to the completion of his statement lasted but approximately two hours; he was advised of his rights to remain silent and of his right to counsel; he claimed neither. He was advised of the seriousness of the offense, and he was not denied food or sleep. Although he was young and of mediocre educational background, his responses were, it is suggested, generally appropriate (Tr. 150-151, 608-609). As to impairment of judgment, the police specifically inquired of his ability to understand (Ex. 14, App. 35-36). The questioning techniques employed by the police were indeed designed to produce answers and were, it is suggested, requisite to the solution of the crime. This Court has never held such techniques to be per se unconstitutional; rather, it is only where such techniques are so unnecessary (cf. *Haynes* v. *Washington*, 373 U.S. 503 [1963]), or so oppressive as to offend notions of common decency (cf. *Malinski* v. *New York*, 324 U.S. 401, 407 [1945]), that the bounds of due process are held to have been exceeded. See *Haynes, supra*, at 515.

Under the totality of the circumstances, therefore, it cannot fairly be said that the will of the accused may be properly considered to have been "overborne."

D. *The Statement was Obtained in Full Compliance with Miranda v. Arizona, 384 U.S. 436 (1966).*

The defendant, in accordance with *Miranda*, was fully advised of his rights to counsel and to remain silent. He acknowledged each and responded that he understood (Ex. 14, App. 23). Neither *Miranda* nor any other case in this Court requires an elaboration on the meaning of these rights or requires more than a one-word "yes" or "no" answer. *North Carolina* v. *Butler*, ____ U.S. ____, 99 S. Ct. 1755 (1979).

The trial court and apparently the Supreme Judicial Court are of the view that *Miranda* additionally requires that a

defendant be informed that waiver may "expose . . . [him] to . . . serious and lifelong consequences" (App. 52). Such a requirement goes beyond *Miranda*.

The skillfulness of the interrogation which followed the waiver cannot logically be considered retrospectively to invalidate the prior waiver which occurred when the defendant after acknowledging his rights answered "yes" to the question "Are you willing to talk to me about Maryann Birks?" (Ex. 14, App. 23). At no time during the interrogation did the defendant claim his privilege or request counsel.[19]

The only question is whether an 18-year-old man with "moderate and limited schooling" (App. 52), who had taken Valium and beer the night before interrogation, may effectively waive his rights. The transcript of the interrogation reveals no aberrational conduct on the part of the defendant. Indeed, it reflects the defendant's attempt to misdirect the officers as to the extent of his acquaintance with the victim (Ex. 14, App. 24, 28) and to explain the blood on his sneakers (Ex. 14, App. 25, 26).

In addition to the defendant's ability to respond, as evidenced by the transcript of his statements (Ex. 14, App. 22-42), the officers testified that his responses were coherent and that there were no obvious indications that the defendant was under the influence of alcohol or drugs (Tr. 150-151, 608-609). It is suggested that the effects of alcohol and drugs, the major

[19]The only possible indication of an attempt to terminate questioning occurred when, after nine questions concerning the victim's clothing, the defendant answered, "No," in response to the question: "Is there anything else, Joe, that you would like to tell us?" (Ex. 14, App. 32-33). In context, this reply merely indicated he had nothing more to say about the victim's clothing, and the matter was dropped. *Michigan* v. *Mosley*, 423 U.S. 96 (1975), held that there is no per se proscription of indefinite duration against further questioning on any subject merely because a suspect indicates a desire to remain silent.

portion of which had been consumed fourteen hours earlier (Tr. 563), during which time the defendant had slept and eaten breakfast (Tr. 538-539), could not be deemed to have rendered him incapable of executing a waiver.

Here, it was not found that the defendant was intoxicated, but merely that his judgment was somewhat impaired by prior ingestion of alcohol or drugs. Such impairment is not sufficient to invalidate a waiver. Cf. *Britt* v. *Commonwealth*, 512 S.W. 2d 496 (Ky. 1974). To hold otherwise, it is submitted, would result in a near per se ban on interrogation of habitual users of drugs or alcohol. It would place upon the police a "straightjacket" not even contemplated by *Miranda*.

III. There is No Constitutional Requirement that Statements Obtained in Violation of the Fifth Amendment or of the Prophylaxes of Miranda be Subject to Per Se Exclusion for All Purposes in All Proceedings.

The court below held that certain items of clothing obtained from the defendant's home pursuant to a legally obtained search warrant must be suppressed because the defendant's illegally obtained statement was used to form the basis for a finding of probable cause. The court held that exclusion was required "simply on the ground that the confession was involuntary and thus directly offensive to the Fifth Amendment." *Commonwealth* v. *Meehan*, ____ Mass. ____, Mass. Adv. Sh. (1979) 710, 727, 387 N.E. 2d 527, 536 (App. 77). However, it will be suggested, the Fifth Amendment's automatic bar to the use of compelled testimony does not extend, by its own terms, to the proceeding in question, nor to the evidence sought to be introduced. Moreover, a violation of *Miranda* safeguards does not require automatic disqualification of a confession for all purposes, let alone trigger the doctrine of *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

A. *The Fifth Amendment Exclusionary Rule has No Application to Either the Proceeding or the Evidence Involved.*

The Fifth Amendment precludes by its own terms use of judicially compelled testimonial evidence at a criminal *trial*. The Amendment was historically directed to the abuses of the Inquisition and Star Chamber proceedings and designed to prohibit judicial compulsion of incriminating testimony under oath.[20] It is only the introduction of the defendant's testimony at trial that is barred by the privilege. And it is only *testimony* that may not be compelled. Here, the statement was utilized only in seeking issuance of a search warrant. It was not, at this point, being utilized for trial purposes, nor to establish guilt or innocence. Moreover, the Fifth Amendment bar to compulsion is not absolute. "[T]hat compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Schmerber* v. *California*, 384 U.S. 757, 764 (1966). See also *Keister* v. *Cox*, 307 F. Supp. 1173, 1176 (W.D. Va. 1969).

The testimonial content of the statement is not here being used as evidence of guilt or innocence — it is the real evidence to be introduced at trial which goes to that determination, and the Fifth Amendment is not directed against the compulsion to produce real or physical evidence. *Gilbert* v. *California*, 388 U.S. 263, 265-267 (1967); *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967); *Holt* v. *United States*, 218 U.S. 245 (1910). To extend the Fifth Amendment to bar use of the statement in such a proceeding and to such evidence as is involved herein is, therefore, unwarranted.

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[20] See, e.g., *Ullmann* v. *United States*, 350 U.S. 422, 428 (1956); 8 Wigmore, *Evidence*, § 2250, pp. 267-295 (1961); Friendly, *Benchmarks*, 270-271 (1967).

Moreover, such a per se approach as was adopted by the court below runs counter to this Court's declaration that there is no absolute constitutional prohibition against the use of illegally obtained evidence for all purposes in all proceedings.

> "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974), quoted in *Brown* v. *Illinois*, 422 U.S. 590, 600 (1975).

For example, the Court has consistently held that an indictment returned by a properly constituted grand jury is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence. *United States* v. *Blue*, 384 U.S. 251 (1966); *United States* v. *Calandra*, 414 U.S. 338 (1974).[21]

Similarly, the Court has declined to extend the exclusionary rule to hold inadmissible in a federal civil tax proceeding evidence obtained by a state law enforcement officer pursuant to a search warrant later proved to be defective. *United States* v. *Janis*, 428 U.S. 433 (1976). Most recently, this Court has held admissible living witness testimony which was the fruit of an illegal search. *United States* v. *Ceccolini*, 435 U.S. 268 (1978).

The thrust of these cases, it is submitted, constitutes an obvious rejection of a per se, inflexible application of the exclusionary rule to proscribe use of illegally seized evidence for all purposes in all proceedings. The inflexible application of the exclusionary rule utilized by the court below is simply not required under federal standards.

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[21] If an indictment is not vitiated as a result of the use of such evidence, it is difficult to understand why an otherwise valid search warrant (certainly a far less onerous burden on the accused) would be vitiated.

If the exclusionary requirement inherent in the Fifth Amendment does not extend to the instant situation, then it is only the "fruit of the poisonous tree" doctrine enunciated in *Wong Sun* v. *United States, supra,* which would justify exclusion of the statement from the proceeding here at issue.

B. *There is No Requirement that the "Fruit of the Poisonous Tree" Doctrine be Automatically Applied to Fifth Amendment Violations.*

While this Court has indicated that, in a proper case, the rationale of *Wong Sun* v. *United States, supra,* might be applicable to Fifth Amendment violations in addition to Fourth Amendment violations, *Michigan* v. *Tucker,* 417 U.S. 433, 447 (1974), this is not the proper case for such application. In this case, there is no actual compulsion — either physical or psychological — such as is generally understood in Fifth Amendment terms. Rather, the circumstances leading to a finding of involuntariness either as to waiver or as to the confession itself involve the defendant's subjective reaction to his surroundings and to police interrogational procedures which in other instances have been held to be not in themselves coercive.

Under these circumstances, a balancing test is appropriate and permissible.[22] It should take into account the nature of

[22] In *New Jersey* v. *Portash,* ____ U.S. ____, 99 S. Ct. 1292 (1979), this Court reached the opposite conclusion. However, the circumstances of that case were quite dissimilar. The State argued that under the balancing test of *Harris* v. *New York,* 401 U.S. 222 (1971), and *Oregon* v. *Hass,* 420 U.S. 714 (1975), it should be permitted to use immunized grand jury testimony to impeach inconsistent statements at trial. Noting that a grant of legislative immunity — talk or government sanctions will be imposed — constitutes the privilege in its most "pristine" form, this Court held that any balancing of interests in the decision to exclude such testimony from a criminal *trial* was impermissible and that all compelled statements were barred for testimonial use at trial. However, the instant case involves neither judicial nor legislative compulsion, nor use of testimony at trial.

the proceeding in which the statement is sought to be used, the nature of the violation, and the effect of applying the exclusionary rule, balanced against the interests of society and justice in having guilt or innocence determined on the basis of trustworthy evidence.

1. *Nature of the collateral proceeding.* The statement in question was utilized to form the basis for probable cause for issuance of a search warrant. Evidence otherwise inadmissible at trial because it is hearsay has traditionally been an appropriate basis for a finding of probable cause. The only constitutional limitation is that it be reliable. *Spinelli* v. *United States,* 393 U.S. 410 (1969); *Aguilar* v. *Texas,* 378 U.S. 108 (1964). Here the reliability of the statement is quickly verifiable. The evidence will be discovered, or it will not. If it is discovered, the statement obviously was reliable. If the evidence is not discovered, the defendant will not, in any way, be disadvantaged by the use of his statement.

Moreover, a proceeding to determine probable cause for issuance of a search warrant may be characterized as an ex parte, summary proceeding, not an adversarial proceeding. Such a distinction has been noted by lower federal courts wherein they have declined to exclude evidence obtained in violation of *Miranda* v. *Arizona, supra.* See *United States ex rel. Sperling* v. *Fitzpatrick,* 426 F. 2d 1161 (2d Cir. 1970) (parole revocation hearing); *United States ex rel. Vitiello* v. *Flood,* 374 F. 2d 554 (2d Cir. 1967) (extradition proceeding). It is submitted that exclusion at trial of an illegally obtained statement is sufficient to provide deterrence and that exclusionary rules do not apply to collateral proceedings not designed to establish guilt or innocence.

2. *The nature of the violation permits of a balancing test.* If, indeed, this case involves an involuntary confession rather than a confession obtained in the absence of a knowing, intelligent and voluntary waiver as required by *Miranda*, the facts do not support a finding of "genuine compulsion of testimony" (*United States* v. *Washington*, 431 U.S. 181, 187 [1977]), requiring automatic exclusion. Rather, it is suggested, a balancing test is appropriate and due weight should be given to whether the purpose behind the application of the exclusionary rule would be met by its application here. Here, the court below reached its decision, not based solely upon any official act of genuine compulsion, but on the defendant's subjective state — his age, educational experience, and the possible effects of his prior voluntary ingestion of alcohol and drugs which the court apparently determined to render him without capacity to confess voluntarily (or waive his rights). Under these circumstances, the "fruits" doctrine should not be applied. The only purpose justifying application of the exclusionary rule is to deter future police misconduct. *United States* v. *Calandra*, 414 U.S. 338, 347 (1974).

Where there is no police misconduct of a nature which offends civilized notions of decency, and the confession is rendered involuntary only as a result of a compilation of circumstances largely created by the defendant himself, no deterrent purpose would be achieved. There is, it is suggested, no justification for depriving the finders of fact of real probative evidence in such an automatic fashion as exhibited by the court below.

In *Brown* v. *Illinois*, 422 U.S. 590 (1975), this Court while applying the "fruits" doctrine to exclude a statement made subsequent to an illegal arrest (no probable cause), recognized that exclusion was not automatic, but that the decision must be based on analysis of several factors, "particularly, the purpose and flagrancy of the official misconduct . . .." 422 U.S. at 604.

In the instant case, the police are criticized for carrying out a "skillful interrogation," for asking leading questions, for not eliciting more than one-word answers, for making a slight misrepresentation as to the weight of the evidence, and for suggesting that it would be better to tell the truth. Such conduct, it is suggested, does not constitute a deliberate attempt to subvert constitutional rights. Suppressing real evidence obtained pursuant to a valid search warrant "would hardly have served an important demonstrative purpose of deterring the police from future malfeasance." *Commonwealth* v. *Fielding*, 371 Mass. 97, 114 (1967) (footnote omitted).

Application of the exclusionary rule is even less appropriate in the case at hand, where police officers possessed sufficient information, in addition to the confession, to obtain a search warrant. At the time of application for the warrant, the police had been informed that the defendant and the victim were seen together, that the defendant had offered contradictory explanations of the stains on his sneakers, that the sneakers were stained with blood and that a person fitting his description had been seen leaving the scene of the murder just after the screams of a woman had been heard. Indeed, the Supreme Judicial Court conceded that the police had probably sufficient evidence to justify the issuance of the warrant. 387 N.E. 2d at 536 (App. 77).

C. *The Automatic Exclusion of Statements Obtained in Violation of the Waiver Requirement of Miranda v. Arizona, 384 U.S. 436 (1966), is Not Constitutionally Required.*

Assuming that the confession is not involuntary and in direct conflict with the Fifth Amendment privilege against compelled

testimony, on the Supreme Judicial Court's analysis it may be deemed that the prosecution has failed to meet the burden of proving waiver as required by *Miranda* v. *Arizona*, at 445. However, this conclusion does not necessarily involve a violation of the Fifth Amendment, and the Supreme Judicial Court is in error in treating *Miranda* requirements as co-extensive with the Fifth Amendment. If only a *Miranda* violation not involving the Fifth Amendment has occurred, the "fruits" doctrine, it will be argued, is not applicable.

As has been suggested, it appears clear that the warning and waiver requirements of *Miranda* do not have independent, immutable, constitutional status, but are merely judicially created regulations for implementing constitutional commands. See generally, *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420 U.S. 714 (1975).[23]

Michigan v. *Tucker*, *supra*, is unequivocal in its assertion that a violation of *Miranda* does not necessarily involve a violation of a constitutional right. *Tucker*, 417 U.S. at 444-445. In *Tucker*, the Court, although finding that *Miranda* had been violated, did not apply the *Wong Sun* doctrine, stating:

[23] The waiver requirement of *Miranda* does not enjoy any greater constitutional status than the other prophylactic rules, as is evidenced by the concurring opinion of Mr. Justice Blackmun in *North Carolina* v. *Butler*, ___ U.S. ___, 99 S. Ct. 1755 (1979):

> "I join the opinion of the Court. My joinder, however, rests on the assumption that the Court's citation to *Johnson* v. *Zerbst*, 304 U.S. 458, 464 . . . (1938), *ante* at 1758, is not meant to suggest that the 'intentional relinquishment or abandonment of a known right' formula — the formula *Zerbst* articulated for determining the waiver *vel non* 'of fundamental constitutional rights,' 304 U.S., at 464 . . . — has any relevance in determining whether a defendant has waived his 'right to the presence of a lawyer,' *ante*, at 1758, under *Miranda's* prophylactic rule." 99 S. Ct. at 1759.

> "This Court has also said, in *Wong Sun* v. *United States*, . . . that the 'fruits' of police conduct which actually infringed a defendant's Fourth Amendment rights must be suppressed. But we have already concluded that the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." *Tucker*, at 445-446.

The clear implication of *Tucker* is that the "fruit of the poisonous tree" doctrine would not be triggered unless that primary illegality involved an invasion of a specific constitutional guarantee and that a mere *Miranda* violation does not reach such a constitutional dimension.[24]

The "fruits" doctrine has been held by several lower courts to be inapplicable to *Miranda* violations in the absence of involuntariness. *United States ex rel. Hudson* v. *Cannon*, 529 F. 2d 890 (7th Cir. 1976);[25] *Simmons* v. *Clemente*, 552 F. 2d 65 (2d Cir. 1977). See *Bartram* v. *State*, 33 Md. App. 115, 364

[24] This interpretation is consistent with *Brown* v. *Illinois*, 422 U.S. 590 (1975). In *Brown*, the initial coercion arose from an arrest without probable cause in direct contravention of a constitutional guarantee. The Court merely held that the subsequent giving of *Miranda* warnings could not dissipate that taint.

[25] The Ninth Circuit, in *United States* v. *Lemon*, 550 F. 2d 467, 472 (9th Cir. 1977), did not resolve this issue, for the court held that a statement eliciting a consent to search did not implicate a Fifth Amendment right and therefore *Miranda* was inapplicable. The court, noting that *Miranda* warnings are not constitutional rights in themselves, did, however, hold that statements elicited prior to *Miranda* warnings could be introduced at a pretrial suppression hearing to establish the validity of a search. But see *Tremayne* v. *Nelson*, 537 F. 2d 359 (9th Cir. 1976). See also *Null* v. *Wainwright*, 508 F. 2d 340 (5th Cir. 1975), *cert. denied*, 421 U.S. 970 (1975).

A. 2d 1119 (1976), and cases cited therein;[26] *Rhodes* v. *State*, 91 Nev. 17, 530 P.2d 1199 (1975).

The Commonwealth submits that the only justification for extension of the *Wong Sun* doctrine to situations involving the Fifth Amendment flows from a determination that the initial statement leading to derivative real evidence was involuntary as a result of compulsion or intentional bad faith conduct on the part of police which could be deemed to have "overborne the will" of the accused. It is submitted that the conduct of the police in this case was not flagrant nor did it result in the deprivation of a personal constitutional right.

Where there has been no flagrant violation of either the Fifth Amendment or the prophylaxes of *Miranda*, to require a blanket application of the exclusionary rule is, the Commonwealth suggests, overkill and is not compelled by federal standards.

> "I tend generally to share the view that the *per se* applicaton of an exclusionary rule has little to commend it except ease of application. All too often applying the rule in this fashion results in freeing the guilty without any offsetting enhancement of the rights of all citizens. Moreover, rigid adherence to the exclusionary rule in many circumstances imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. . . . I therefore have indicated, at least with respect to Fourth Amendment violations, that a distinction should be made between flagrant

[26] In *In re Appeal No. 245*, 29 Md. App. 131, 349 A. 2d 434 (1975), the court acknowledged the distinction, but found a fundamental violation of the constitutional right against self-incrimination. It is important to note that the court also found the initial illegal detention to be "patently flagrant." 29 Md. App. at 145, 349 A. 2d at 442.

> violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other." *Brewer* v. *Williams*, 430 U.S. 387, 413-414 n.2 (1977) (concurring opinion of Mr. Justice Powell).

The Commonwealth recognizes that the Fifth Amendment may be implicated in the instant case, but suggests that a contrary approach is not mandated. This case simply does not involve any conduct on the part of the police which could be deemed to constitute an intentional attempt to deny the defendant his constitutional rights. Compare *Brewer* v. *Williams*, 430 U.S. 387 (1977).

Therefore, the Commonwealth submits that the deterrent purpose of the exclusionary rule would have little effect in this case, for there was no intention to violate any rights of the defendant, and the Commonwealth possessed evidence obtained independently of the illegally obtained confession to support issuance of the search warrant.

IV. The "Cat-out-of-the-Bag" Theory does Not Require Suppression of All Statements Made Subsequent to an Illegally Obtained Confession.

Approximately four hours after the interrogation, the defendant's mother and brother arrived at the police station (Tr. 614). After being advised of the circumstances underlying the defendant's arrest and that he had confessed, the family was escorted to the defendant's cell (Tr. 614). An officer testified that as the family appeared, the defendant cried out, "Ma, I didn't mean to hit her so hard" (Tr. 615). The defendant and his mother testified, "he said only, 'I'm sorry, Ma'" (Tr. 487). The Supreme Judicial Court ruled that the

statement must be suppressed. Given the illegality of the initial confession, the subsequent statement was inadmissible under the "cat-out-of-the-bag" theory. The Commonwealth respectfully suggests that the court below has misconstrued the law.

This Court has never held that the making of a confession under circumstances precluding its use at trial precludes use of all later voluntary inculpatory statements. *United States* v. *Bayer*, 331 U.S. 532 (1947). The determinative factors relevant to the instant case are that the statement was spontaneous, was an expression of regret directed to a family member and was not in any sense elicited by interrogation, nor directed to the police. The "cat-out-of-the-bag" theory requires suppression only if, after a prior improper confession, the defendant is motivated by the belief that any effort to withhold information would be futile and that no harm can be done by repetition or amplification of his earlier statements. *Darwin* v. *Connecticut*, 391 U.S. 346 (1968). In *Darwin*, as in other cases relied upon by the lower court,[27] the subsequent statement was elicited by further police interrogation. The circumstances surrounding the statement at issue do not meet this standard: there was no attempt to obtain information on the part of the police; therefore, no consideration of whether an effort to withhold the information would be futile is appropriate and the statement was not repetitious of the prior confession. It was, rather, an expression of regret to a family member.

Copeland v. *United States*, 343 F. 2d 287 (D.C. Cir. 1964), provides the correct two-prong test. To exclude the statement, the court must find "(a) that it would not have been made but for the interrogation and (b) that it was a result — a

[27] See, e.g., *United States* v. *Gorman*, 355 F. 2d 151 (2d Cir. 1965); *Brown* v. *Illinois*, 422 U.S. 590 (1975).

fruit — of deliberate exploitation by police of interrogation . . . ." *Copeland*, 343 F. 2d at 291.

The first prong of the test is not met in the instant case. The defendant was placed under arrest prior to the interrogation. It is reasonable to suggest that his relatives would arrive at the police station at some point, and it is sheer speculation to assume that the defendant would not have made his spontaneous expression of regret to his mother, absent his prior confession. As the court stated in *Copeland*, 343 F. 2d at 291:

> "Whatever the force to the 'cat-out-of-the-bag' argument in determining a nexus between two successive confessions to police, it would seem to have none as to a spontaneous, unsolicited and unexpected comment addressed only to a victim. An apology to a private citizen is a different breed of 'cat' from the kind involved in a statement to police."

The second prong of the test is equally unsatisfied. Far from any deliberate exploitation of the original confession on the part of the police, they played no role in the statement at issue, except, by happenstance, to be present. They did nothing to prompt the defendant's expression of regret to his mother, nor was the exclamation addressed to them. This case is clearly distinguishable from *Ricks* v. *United States*, 334 F. 2d 964 (D.C. Cir. 1964), relied upon by the court below. In *Ricks*, the apologies were made in the course of the police interrogation and with the direct involvement of the police, who arranged the confrontation. Similarly, *State* v. *Paz*, 31 Or. App. 851, 572 P. 2d 1036 (1977), offers no support for the lower court's position. There, the defendant's telephone call to his parents was predicated upon his first making a confession; a call was made during the course of continued inter-

rogation and after the police had brought in an interpreter to transcribe it. In the instant case, there is no such police involvement. The Commonwealth therefore suggests that the Supreme Judicial Court has applied the exclusionary rule far beyond that which is constitutionally required or contemplated by the rulings of this Court.

Conclusion.

For the reasons stated above, the decision of the court below should be reversed.

Respectfully submitted,

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